No. 77-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,
Appellants

v.

HOLBROOK BRADLEY, ET AL.
Appellees

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

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Pursuant to Rule 16(1)(C) of the Rules of this Court, appellees move to affirm the judgment of the district court.

STATEMENT

This case involves an appeal by the government from the unanimous decision of the three-judge court below (Robb, Circuit Judge, and Gesell and Flannery, District Judges) that Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 1002, which requires retirement at age sixty for those employees covered by the Foreign Service Retirement System, violates the equal protection guarantees embodied in the Fifth Amendment.

This retirement provision applies to employees of the State Department, the United States Information Agency (USIA), and the Agency for International Development (AID) who are covered by the Foreign Service Retirement System.

As originally enacted in 1946, Section 632 applied only to Foreign Service officers (a small group of employees performing primarily political and diplomatic duties) but over the years the Foreign Service system was expanded to take in other State Department employees such as visa stampers, secretaries, and technicians. USIA teaching, cultural, and information employees were added to the system in 1968 and AID employees in 1973.

The employees of the three agencies who are covered by the Foreign Service retirement system occupy a wide variety of jobs. Some are Foreign Service officers who specialize in one of four specialties: economic, administrative, consular or political. Depending on their specialty, at age sixty an officer may be performing (1) economic research and analysis; (2) personnel recruitment, management, or other administrative functions; (3) visa and other consular work; or (4) political research, analysis, and negotiations with representatives of foreign governments.

Some of these employees are USIA officers whose jobs range from performing cultural, lecturing, and other information duties, to performing administrative and personnel management functions. Cultural officers establish liason in other countries with universities and scholarly groups and with symphonies, museums, and other cultural organizations. They also maintain libraries, and arrange for exchanges of students and scholars and for tours of foreign countries by American artists. Information officers establish liason with the media in other countries, prepare press releases, prepare and distribute film strips and maintain film libraries. USIA personnel also provide

the staffing for the Voice of America broadcasts and arrange for satellite programming.

Some of these employees are personnel of the Agency for International Development which is concerned with providing economic and technical assistance to other countries.

Finally, some of these employees are staff employees (rather than officers) and include librarians, secretaries, clerks, language teachers, radio and television engineers, and a wide variety of support personnel.

The vast majority of the Foreign Service employees perform functions (teaching, cultural liason, engineering, research, etc.) similar to those performed by civil service employees.

Appellee-employees brought suit in the District Court for the District of Columbia claiming a denial of the equal protection guarantees embodied in the Fifth Amendment on the ground that the age sixty retirement provision failed to meet the rational basis standard of review enunciated by this Court.

The government-appellants defended this suit primarily on the ground that the reason set forth in the legislative history of the provision, and more fully set forth in a letter dated July 28, 1975, from the Director General of the Foreign Service to the Civil Service Commission (Gov. Ex. 2) demonstrated a rational basis for the age sixty retirement requirement, to-wit: the government needs to maintain the Foreign Service corps as a corps of highly qualified individuals with the necessary physical stamina and intellectual ability to perform effectively at posts around the world, and since Foreign Service employees who reach age sixty have been exposed to extraordinary hazards and stresses by working overseas that other employees have not, they do not have the necessary physical stamina and intellectual ability to perform their jobs.

The appellees responded that however rational the government's claim might sound on first impression, the actual facts would show that overseas work does not involve extraordinary hazards and stresses dissimilar to those faced by other government employees, and that, in any event, overseas work does not diminish the physical stamina or intellectual ability of post-sixty year old employees to perform their varied jobs.

Appellees served an initial set of interrogatories on the government agencies which was answered. Appellees then attempted to serve additional interrogatories, to take depositions, and to present testimony of witnesses for the purpose of supporting their contention that there was no rational basis for the age sixty retirement provision. The government agencies opposed the answering of further interrogatories or the taking of depositions and insisted that the case could be decided by the district court on the basis of the government's motion for summary judgment. The district court agreed with appellants and set for hearing the government's motion for summary judgment.

The district court had before it the pertinent excerpts from the legislative history cited by the government and the letter from the Director General of the Foreign Service to the Civil Service Commission of July 28, 1975. The district court also had before it (1) a number of affidavits introduced by appellees, including affidavits of medical and other experts, and (2) extensive statistical data and other factual information obtained from the government records made available to appellees. This evidence was introduced by appellee-employees to demonstrate that there was no basis in fact for the government's claim that overseas work diminishes the competence of Foreign Service employees.

Subsequent to the hearing, the district court issued an order on December 3, 1976 stating that the record relating to the rationality of the classification challenged appeared

to be incomplete, particularly with respect to the factors underlying congressional enactment of it. The parties were requested to supplement the record with additional affidavits, which was done on February 1, 1977. Subsequently, the district court requested additional supplementary information. However, plaintiffs were still not given an opportunity to engage in additional discovery.

Appellees contended throughout the proceeding below that if they were given the opportunity to proceed with additional interrogatories, the taking of depositions, and the introduction of witness testimony, they would be able to introduce further evidence that overseas work does not diminish the ability of Foreign Service personnel to perform their various jobs. For example, in their Memorandum in Support of Motion for Permitting Plaintiffs to Engage in Discovery, Feb. 1, 1977, appellees stated that they wished to obtain statistical data from the medical division of the defending agencies in order to further support their contention (already supported in affidavits) that proportionally more Foreign Service employees under the age of 50 are medically disqualified from serving at hardship posts than are employees over the age of 50, and that proportionally more employees under the age of 50 are given medical discharges for psychological and psychiatric health problems than are employees over the age of 50.

Although given a specific opportunity to supplement the record with additional factual information to support their claim that overseas work diminishes the ability of Foreign Service employees to perform their varied jobs, government appellants submitted no independent evidence. Instead, appellants relied entirely on the statements in the legislative history and the statement of their own personnel director that mandatory retirement at age sixty is required because extraordinary conditions overseas impair the ability of post-sixty year old employees to perform their jobs.

Appellees contended in their Memorandum filed February 1, 1977 (at 3-4) that given the slim factual showing by appellants to support their claim, the district court had before it sufficient evidence introduced by appellees to demonstrate that there was no rational purpose for the provision at issue. Appellees stated that if the court agreed with this view, they would waive their right to further discovery and would consent to the court treating the case as if submitted on cross-motions for summary judgment. Appellees insisted, however, that if the court did not agree that there was sufficient evidence to find for appellees, they wanted, and were entitled to, the opportunity to proceed with discovery and the opportunity to introduce additional evidence.

The district court issued its unanimous opinion in favor of appellees on June 30, 1977. The district court's opinion noted that under this Court's decisions, the proper test for adjudging the disputed provision was whether there was a rational basis to support it. The district court went on to state that the "rational basis standard" means that a legislative provision is "presumptively valid" and that its challengers have a "heavy burden in proving its invalidity" (J.S. 3A). The district court concluded: "On the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny" (*Id.* at 3A-4A).

ARGUMENT

1. THE QUESTION IS NOT SO SUBSTANTIAL AS TO REQUIRE PLENERY CONSIDERATION.

The three-judge court below decided this case on the basis of the factual record presented to it by the parties. No new or precedential questions of law were decided. The court below simply, and properly, applied to the facts before it the rules of law enunciated by this Court

in those previous equal protection cases which involved a rational basis standard of review. *E.g., Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Reed* v. *Reed*, 404 U.S. 71 (1971).

In *Murgia*, this Court ruled that the proper standard for judicial review of a classification based on age is whether it is rationally related to a legitimate governmental objective. 427 U.S. at 314. As the district court below noted, this standard of review does not require judicial abdication although it does mean that the legislatively drawn distinction is "presumptively valid" and that its challengers have a "heavy burden in proving its invalidity" (J.S. 3A).

In *Murgia*, this Court reviewed the factual evidence in the record and concluded on the basis of that record that a mandatory retirement age of 50 for uniformed policemen was rationally related to the legitimate government goal of protecting the public. This Court specifically found, for example, that members of the uniformed branch of the Massachusetts State Police were required to perform the most physically demanding and arduous police tasks and that the less physically demanding jobs, such as detective work, juvenile and women's work, or desk jobs, were handled by entirely separate branches of the State Police whose employees did not have to retire until age 65 but whose positions were not available to members of the uniformed branch (*id.* at 310, 315-316). This Court noted that the uniformed branch officers participated in controlling prison and civil disorders, responded to emergencies and natural disasters, patrolled highways in marked cruisers, investigated crimes, apprehended criminal suspects and provided back-up support for local law enforcement personnel (*Id.* at 309). This Court further noted that it had never been seriously disputed, if at all, that the work of the state uniformed officers was more demanding than that of

other state, or even municipal, law enforcement personnel, and that it was this difference in work that underlay the earlier retirement age for uniformed policemen (*Id.* at 315, note 8). This Court also pointed to the medical evidence in the record that established that the risk of physical failure, particularly in the cardiovascular system, increases with age, and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group (*Id.* at 311). Since the factual record before this Court showed that the tasks of the uniformed police branch—controlling riots, apprehending criminal suspects, etc.—were inherently "stress" functions, this Court concluded that "Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police" (*Id.* at 314). In short, this Court's holding in *Murgia* is clearly not that all age limitations are reasonable and constitutional but rather only that this issue must be determined on the basis of the record in the particular case.

The present case presents a wholly dissimilar factual situation to that in *Murgia*. Here we are concerned with a wide variety of jobs, nearly all of which are white collar desk jobs and none of which involves physical protection of the public.

Although they were precluded from completing discovery, appellees nonetheless introduced substantial evidence—largely in the form of affidavits and statistics drawn from government records—to support their challenge to the age sixty retirement provision. The three-judge court unanimously found on the basis of this evidence that appellees had sustained their "heavy burden" in proving the invalidity of the provision. Appellants present no compelling reasons why this Court should embark upon a review of the lower court's analysis of that factual record.

Appellants merely repeat here their factually unsupported claims made to the court below—that Foreign Service personnel, unlike other government personnel, tend to work overseas, that this work entails unusual physical and psychological difficulties, and because of these circumstances, their ability to carry out assignments after the age of sixty, particularly at so-called "hardship posts" overseas, is diminished.

The government compiled no medical findings, no statistics, and no objective empirical studies to support their claims similar to those accumulated by the Department of Transportation in establishing a mandatory retirement age of 56 for air traffic controllers, by the Federal Aviation Agency in establishing a mandatory retirement age of 60 for airline pilots, or by the State of Massachusetts in establishing the mandatory retirement law for uniformed policemen which was challenged in *Murgia*.[1] Similarly, no such empirical studies were made either before enactment of Section 632 in 1946 (or before enactment of its earlier analogous provision relating to

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[1] Congress has relied upon detailed scientific and empirical studies in establishing lower retirement ages for workers in jobs involving public safety. Thus, before establishing a mandatory retirement age of 56 for air traffic controllers, it relied upon studies by the Department of Transportation wihch examined all available data concerning the relationships between stress, age and occupation, and tested the physiological impact of stress on air traffic controllers. H.R. Rep. No. 615, 92nd Cong., 1st Sess. 5-15 (1971).

Similarly, as the Second Circuit noted in *Airline Pilots Assn. v. Quesada*, 276 F.2d 892, 898 (1960), the Federal Aviation Agency undertook an empirical study before it enacted a regulation requiring airline pilots to retire at age 60. The agency based its decision on medical evidence in the record that sudden incapacitation due to heart attacks or strokes becomes more frequent as men approach age sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks. Because of this, the Second Circuit held that the age sixty limit had a rational relationship to the FAA's job of providing for air safety and particularly for protecting the public from air accidents.

consular officers in 1924) or in subsequent years as additional categories of employees were brought under the Act. Moreover, the government-appellants did not submit any objective empirical evidence to the court below to counter the evidence submitted by appellees. The government's argument seems to be that so long as it can assert a basis for the mandatory retirement provision which sounds rational, whether or not the assertion is based on actual facts, that is the end of the judicial inquiry. As the court below properly noted, however, the rational basis standard of review, even though it imposes a heavy burden on a party challenging a legislative classification, does not require total judicial abdication. The facts simply do not support appellants' claims.

For example, the appellants claim that Foreign Service employees spend 30 years or more of service representing the government in foreign countries in widely differing climates and environments (J.S. 9). However, an analysis of the careers of Foreign Service employees listed in the State Department's *Biographic Register* for 1974 showed that Foreign Service employees over the age of fifty had served an average of 15 years abroad (Pl. Ex. 12). All Foreign Service employees are required to serve some tours in the United States and, as is evident from the *Biographic Register*, many spend the majority of their careers in the States. Indeed, the undisputed evidence shows that some Foreign Service employees are even ineligible for overseas duty and are assigned to work permanently in the States (Def. Ans. to Pl. Amended Interrog., Paras. 21-22).

The appellants also state (J.S. 16) that the Foreign Service employs a special corps of persons, who enter the Service during their youth. However, many employees enter the Service at later stages of their careers. Plaintiff Olsen, for example, had been a language teacher for many years when he joined the USIA at age 45.

Mr. Van den Berg had been manager of field services for a large international corporation when, at the age of 47, he was recruited by USIA to supervise its power plants at overseas Voice of America stations. (Olsen Aff., para 1; Van den Berg Aff., Para. 1).

And while appellants claim (J.S. 9, 12) that the Foreign Service work which is overseas consists of "discomforts" and service in "isolated, primative or dangerous areas", the undisputed evidence in the record shows that most of the overseas work is not in such areas (commonly referred to as "hardship posts").[2] Only 22% of all State Department Officer positions, only 11% of all USIA officer positions, and only 11% of all staff positions in the Foreign Service are at hardship posts (Webb Aff., para. 2).[3] Most overseas positions in the Foreign Service are in such non-hardship posts as London, Paris, and Nassau.

Even at the so-called "hardship posts," the evidence in the record shows that the hardship conditions cited in the government's letter to the Civil Service Commission (Gov. Ex. 2)—poor housing, limited variety, poor quality, and unsafe foods, substandard sanitary conditions, etc.—largely existed in the past and, in any event, are largely inapplicable to Foreign Service employees. Thus, while adequate housing and sanitary facilities may be in short supply, and large segments of the local population may live in substandard housing with substandard sanitary facilities, the uncontradicted evidence in the record is

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[2] Those posts which the government considers to be isolated, lacking in cultural amenities or adequate elementary and secondary schools, or otherwise undesirable, are classified as hardship posts, and employees of both the Foreign Service and the Civil Service are entitled to extra pay while serving at such posts (Pl. Exs. 3 and 4).

[3] By way of contrast, 80 of 286 Agriculture Department employees overseas in 1975 (or 28%) were located at hardship posts (J.S. 14, note 9).

that housing and sanitary facilities for Foreign Service employees is never substandard and is frequently superior to that enjoyed by Civil Service employees in the United States (Barall Aff., para. 9; Olsen Aff., para. 6; Van den Berg Aff., para. 5; Wells Aff., paras. 4-5). For example, appellee, Mary Cardoso, a secretary, and her husband were provided with a two-bedroom air-conditioned apartment in Zanzibar, complete with two full-time servants and use of the embassy swimming pool and tennis courts (Cardoso Aff., para. 3). Appellee Olsen's affidavit states that "[t]he housing has been better than what I could have obtained in the United States for the same price" (Olsen Aff., para. 6).

And while there may be a limited variety and quality of food available in local markets, the record shows that Foreign Service personnel usually have the use of United States government commissaries as well as the use of airplanes which fly in fresh food from nearby posts (Barall Aff., para. 10).

Moreover, many of the "hardship posts" have other amenities not available to the majority of Washington civil servants—for example, low-cost household help, unpolluted beaches and air, private swimming pools and tennis courts paid for by the U.S. government, inexpensive liquor and food, slower pace of life, and high status in the local community (Barall Aff., paras. 9-10).

Although the government claims (J.S. 9-10) that "the threat of terrorist activity has grown in many areas," the undisputed expert witness testimony in the record is that terrorist attacks occur rarely, and when they do occur, they are not aimed at older aged employees more than the younger ones (Barall Aff., para. 11).[4]

[4] Indeed, appellees' expert witness, Ambassador Barall, surmised that statistically there is a greater possibility of criminal attack on the streets of Washington for the thousands of civil service employees who work here (and who can continue to work after the age of sixty) than there is possibility of terrorist or wartime attack on Foreign Service personnel overseas. Moreover, Ambassador Barall noted that Foreign Service employees are provided with guarded homes and personal armed guards, if necessary, a protection not ordinarily afforded civil servants in Washington.

The undisputed evidence in the record shows that Foreign Service employees are not policemen, are not even armed, and are not expected to resist or counter terrorist attack or other violence (Barall Aff., para. 11; Wells Aff., para. 6).

Although the appellants claim (J.S. 9) that Foreign Service employees working overseas are subject to "unhealthful conditions and extremes of climate," the undisputed medical evidence in the record shows that none of the health conditions cited by appellees in this letter to the Civil Service Commission (undulant fever, dysentry, hepatitis, typhoid and tuberculosis) are age related. Moreover, the medical evidence shows that long-term medical condition is not ordinarily affected by bouts of the infectious diseases still prevalent in some underdeveloped countries. (Kessler Aff., paras. 2-3; Munzer Aff., paras. 2-3). The undisputed medical evidence submitted by appellees from a pulmonary specialist showed that there is no medical relationship between aging and the ability to live and work in countries that have extremes of climate or atmosphere and that, in addition, respiratory ailments are more likely to develop or be aggravated in individuals living and working in Washington's highly polluted summer climate than they are to develop or be aggravated in most underdeveloped countries or countries having high altitudes (Munzer Aff., paras. 2, 4). Finally, appellants' medical witnesses pointed out that the general health of Americans has improved steadily in recent decades, their life expectancy has increased, and world health standards have also improved (Munzer Aff., para. 3).

Contrary to the appellants' claim (J.S. 9) that overseas posts are often lacking in medical facilities, the undisputed evidence in the record is that virtually no posts in today's world are lacking in necessary medical faciii-ties and that since the original establishment of the Foreign Service, medical facilities have been established at nearly every post sufficient to take care of usual health problems. In addition, when specialized care is needed, the government provides transportation by air ambulance to major medical centers at no costs to Foreign Service employees at virtually every post (a service not ordinarily provided Civil Service employees working in the United States) (Barall Aff., para 3; Wells Aff., para 4; Cardoso Aff., para. 2). The undisputed affidavit of Dr. Kessler, a physician formerly on the medical staff of the Foreign Service, states that while occasionally Foreign Service employees need to be evacuated to a major medical center for specialized care, this event occurs to employees, and their dependents, at all ages (Kessler Aff., para. 3).

Although the appellants apparently claim (J.S. 9, 14) that overseas work, particularly at hardship posts, entails such unusual physical and psychological difficulties that older employees are less able than younger ones to be assigned to overseas posts, the undisputed statistical evidence in the record, based on information provided by the appellants, shows that older Foreign Service employees between the ages of 55 and 60 serve at hardship posts in the same, or nearly the same, proportion as do all Foreign Service employees (Webb Aff., paras 2-3). In addition, appellees presented uncontradicted evidence that employees are more likely to be disqualified from going to underdeveloped areas when they are young and have young children than when they are older (Barall Aff., paras 2-4). Indeed, one of the principal reasons for classifying a post as a "hardship" post is the absence of

adequate elementary and secondary schools for dependents (Def. Ans. to Pl. Amended First Interrog. Nos. 31-32, Att. 10).

While the appellants claim that Foreign Service employees must be mobile and accept assignments to different posts (J.S. 14) and thus experience "difficult and unsettling changes in their modes of life" (J.S. 8), the appellees submitted the uncontradicted testimony of experts that older workers working overseas have no more difficulty adjusting to changed conditions than younger ones (English Aff., para. 3; Fox Aff., para. 3) and that the psychological stresses of isolation or of establishing a new household in a new setting are ordinarily far greater for Foreign Service employees when they are young or have young children than when they are older and their children are grown (Barall Aff., para. 2).

Appellants further claim that Foreign Service employees are unique because they devote a substantial part of their careers to overseas duty (J.S. 14). Appellees submit that the question of whether or not Foreign Service employees work overseas for greater periods of time than other government employees is irrelevant since the appellants have failed to submit any evidence to show a correlation between working overseas and diminished physical and mental capacity to work. Nevertheless, in response to the district court's request, appellees submitted evidence that larger numbers of Civil Service employees work overseas (58,489) that Foreign Service employees (4,787) and that an individual Civil Service employee working overseas is as likely to spend a siganificant portion of his career overseas as is a Foreign Service employee. For example, appellees showed that employees of the Foreign Agricultural Service (who do not have to retire until age 70) serve overseas in approximately the same manner and for nearly the same number of years as Foreign Service employees (Pl. Ex. 12). Ap-

pellees also introduced Defense Department publications which showed that civilian employees of the Defense Department's Overseas Dependent Schools program—including librarians, teachers, guidance counsellors, social workers and psychologists—who can work until age 70, and who are required to accept assignments to any overseas posts in the world, are employed through the world and that many have in fact worked continuously abroad for 15 to 28 years. (Pl. Resp. to Def. Resp. to Request for Information, June 1, 1977, and Pl. exhibits referred to therein).[5]

In sum, the district court properly concluded, in light of the largely undisputed factual record before it, that there was no basis in fact for appellants' claim that overseas work diminishes the ability of Foreign Service personnel to perform their varied white collar jobs. It properly did not conclude, as this Court did in *Murgia*, that heart attack or any other sudden incapacitating illness on the part of such personnel would present a threat to public safety. There is no compelling reason why this Court should now review the district court's considered review of the evidence presented.

The only basis for the age 60 retirement provision which is sustainable on the record is that stated in a 1966 study of federal retirement systems submitted to Congress, (S. Doc. No. 14, 90th Cong., 1st Sess. 112 (1967):

[5] Appellants are mistaken when they state that a Defense Department regulation limits the overseas tenure of Defense Department employees to a term of five years (J.S. 15). The regulation cited does not apply to all Defense Department employees. The 7,500 employees of the Defense Department's Overseas Dependent Schools program, for example, are not subject to the regulation. In addition, even those civilian employees who are limited to five year tours are allowed to return overseas for subsequent five year tours after serving intervening tours in the United States.

> Retirement at age 60 also enhances the advancement oportunities of the most effective younger personnel * * *

However, while this contention was argued by the government below, and this sentence is included in a longer quotation in the Jurisdictional Statement (p. 12), the government makes no contention based on it in this Court. The reason doubtlessly is that this claim would equally justify any retirement age for any kind of employee regardless of any capability of human beings at that age to perform that kind of work. Such a claim is inconsistent with this Court's entire analysis in *Murgia* which compared the capabilities of uniformed policemen over age 50 to the kind of work expected of them. As the district court noted: "[a]n interest in recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme" (J.S. 4A).[6]

2. THE PRACTICAL CONSEQUENCES OF THE DECISION BELOW ARE INSUBSTANTIAL.

The decision below affects only those employees of the State Department, the USIA, and AID who are covered by the Foreign Service retirement system. Many other employees of the three agencies are not affected because they belong to separate personnel systems and thus are not requird to retire at age sixty. The decision below does not

[6] The appellants introduced no empirical evidence that older white collar employees generally, or post-sixty year old Foreign Service employees in particular, are less able to perform their jobs than younger employees. On the other hand, appellees and *amici* cited numerous scientific studies conducted by the government and others concerning the relationship between aging and ability which concluded that the performance of middle-aged and older persons is at least equal to and oftentimes noticeably better than younger workers, particularly in white collar positions. *E.g.*, *Developments in Aging: A report of the Special Committee on Aging*, 93rd Cong., 1st Sess. 72 (1973).

affect any other federal government employees, the great majority of whom are in the Civil Service and have been allowed to work until age seventy. (Congress recently amended the Age Discrimination in Employment Act to eliminate mandatory retirement entirely for most Civil Service employees. Pub. L. 95-256, 95th Cong., 2nd Sess.).[7]

The decision below will affect only a small number of Foreign Service employees. The three agencies combined employ some 8,000 employees who are covered by the Foreign Service retirement system. However, data furnished by appellants below shows that most individuals entering the Foreign Service do not remain in the Service until aged sixty. The Service provides voluntary retirement for its employees at the age of fifty and many employees take advantage of this provision. Others voluntarily withdraw from the Service before the age of fifty. In addition to voluntary retirement, some employees are involuntarily retired each year because they fail to pass the biennial medical review. Some Foreign Service officers are selected out each year because the annual performance review shows that they are in the bottom ranks of their classes. Still other officers are selected out each year

[7] Congress refrained from extending the new legislation eliminating mandatory retirement to those few categories of employees subject to mandatory retirement provisions in other specific statutes (such as that governing the Foreign Service). Congressman Hawkins, floor manager for the legislation, explained that the leadership of the House Committee on Education and Labor sponsoring the legislation had agreed with the chairmen of the International Relations and Post Office and Civil Service Committees not to extend the new legislation "in order to provide the respective committees charged with jurisdiction over these mandatory retirement provisions the opportunity to review these statutes. . . ." 123 Cong. Rec. 9344, Sept. 13, 1977. Congressman Hawkins noted further that "by this action, we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement [to defer] is to afford the committees the opportunity to review these statutes" (*Id.* at 9969).

because they have not been promoted within specified time limits. As a result of voluntary retirements and selections out, the record shows that as of February 28, 1976, only 51 officers and staff employees who were born 59 years earlier were on the Foreign Service rolls of the State Department (Pl. Ex. 5). The holding of the district court, however, will not mean that even all of these fifty-one employees will actually remain employed beyond age 59. As a practical matter, only a lesser number can be expected to want to work beyond the age of sixty. Moreover, it is reasonable to assume that those few employees who have not been selected out by appellants as a result of the annual performance and biennial medical reviews, and who have not voluntarily retired by age sixty, are individuals whose health is good, whose work performance is good, and are individuals who, notwithstanding the fact that they might (or might not) have been employed in the Foreign Service for their entire working careers, have not lost their enthusiasm for their jobs.

Contrary to appellants' arguements (J.S. 17), the decision below does not prohibit the government from legislatively creating different employment rules for different jobs. The military armed forces, the postal service, the Peace Corps, the Health Service, and other employee groups can continue to be subject to their own separate employment rules and conditions. The Foreign Service can continue, as the district court specifically recognized (J.S. 8A) to have its own distinctive recruitment, promotion, pay and selection out features. Nothing in the decision below requires that all government employees be treated alike. The court below merely held that one aspect of the Foreign Service system was discriminatory. So long as the other features of that system bear a rational relationship to a valid governmental purpose, they would not be subject to challenge on the basis of the decision below. Thus, Congress can offer higher pay and the option of

earlier retirement to Foreign Service personnel as a recruitment device to offset the inconveninece of moving many times and living away from the United States for periods of time since such benefits serve the rational governmental purpose of recruiting well-qualified personnel into the Foreign Service.[8]

The decision below does not prohibit the government from setting a term of years in which an employee can serve in any particular job. For example, by statute individuals can be employed in the Peace Corps for not more than five years, 22 U.S.C. 2506(a)(2). (However, such employees can serve five years even if they are aged 65 or 70 and thus the classification does not discriminate on the basis of age.) Congress similarly can limit service in the Foreign Service to a term of years if it so chooses. So long as such term of service is not irrationally predicated upon age, when age has no bearing on ability to perform the jobs in question, such a provision would presumably be valid.

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[8] Whether or not the total Foreign Service employment and retirement system is more or less beneficial than that offered Civil Service employees is a complex issue and one that has been debated on numerous occasions by employee unions, agency personnel managers, the Civil Service Commission and others. Appellants claim (J.S. 17-18) that the Foreign Service system is more beneficial than that of the Civil Service. However, as appellees noted below in their Memorandum in Opposiiton to Defendants' Motion to Dismiss dated Nov. 24, 1976, at 33-34, many aspects of the Civil Service retirement program are more beneficial than comparable aspects of the Foreign Service program. In addition, the amount of annuity received by a Foreign Service employee upon mandatory retirement at age 60 is ordinarily not significantly greater than that received by a Civil Service employee retiring at age 60 and is less than that earned by the Civil Service employee who works past the age of 60. Moreover, the Foreign Service employee who cannot continue his career past the age of 60 is required to live during the ten year period between 60 and 70 on a substantially lower income than that earned by a comparable employee in the Civil Service who continues ot work to age 70.

The decision below also does not prohibit the government from providing for earlier retirement in the cases of policemen, firemen, air traffic controllers, Armed Forces personnel, or other persons in demonstrably hazardous jobs such as the uniformed patrollman's job in *Murgia* where declining physical ability due to advancing age can fairly be said to pose a risk to the public safety. Indeed, it is still open to the Government to demonstrate that some particular jobs in the Foreign Service are in this category.

Nor does the decision below in any way limit the government's ability to hire, to promote, and to discharge on the basis of ability to perform. President Carter has recently proposed a reorganization of the Civil Service, H.R. 11280, 95th Cong., 2nd Sess. One feature of the new proposal is the establishment of a category of high-ranking civil servants who will be rewarded and promoted according to performance and who will be demoted to lower rankings if their performance is inadequate. Similarly, there is nothing to prevent the Foreign Service from instituting such demotions. And, of course, the decision in no way limits the Foreign Service's already existing authority to select out officers on the basis of performance. Similarly, the decision in no way limits the existing authority of the Foreign Service to discharge its personnel for medical reasons.

The decision below stands only for the principle that a legislative provision setting forth a condition of employment must bear some rational relationship to a legitimate government goal. Presumably, most legislation setting forth employment conditions meets this test. In the instant case, the government's expressed purpose is to maintain a corps of employees physically and intellectually capable of performing the varied jobs of the Foreign Service. Appellees agree that this is a legitimate government objective. However, the government has completely

failed to demonstrate that post-sixty year old employees in the Foreign Service are less physically and intellectually capable of performing those jobs than younger workers. Indeed, the evidence in the record is overwhelmingly to the contrary. Thus, the district court correctly found that appellees had sustained their heavy burden of showing that mandatory retirement of sixty year old employees in the Foreign Service bears no rational relationship to the government's stated objective.

CONCLUSION

For the foregoing reasons, appellees respectfully submit that the judgment of the district court should be affirmed.

Respectfully submitted,

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